

Nos. 81478-3, 81480-5, 81758-8, and 81759-6
Consolidated Under
No. 81478-3

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, et al.,

Petitioners,

v.

DEPARTMENT OF LABOR & INDUSTRIES, and the
BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENT
BOARD OF INDUSTRIAL INSURANCE APPEALS**

ROBERT M. MCKENNA
Attorney General

JOHNNA S. CRAIG
WSBA No. 35559
Assistant Attorney General

SPENCER W. DANIELS
WSBA No. 6831
Assistant Attorney General

PO Box 40108
Olympia, WA 98504-0108
(360) 586-3636

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I. INTRODUCTION AND ISSUE PRESENTED

The Board of Industrial Insurance Appeals (Board) fully endorses the fundamental tenet of RCW 2.43, which is to ensure appointment of qualified interpreters for limited English proficient (LEP) individuals who participate in legal proceedings. The Board takes the requirements of RCW 2.43 a step further by paying for the interpreter services it provides to claimants appearing before it, without regard for indigency. WAC 263-12-097(4). Providing qualified interpreters allows claimants appearing before the Board meaningful access to the legal process.

The Board is a party to this appeal only because, at the superior court, some of the claimants sought an unwarranted remedy against the Board.¹ The Board is not a party to all of the consolidated cases.² Consistent with this Court's directions, the Board has taken no position on the merits of the claimants' arguments concerning Industrial Insurance Act benefits. See *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993). The Board, however, briefed and argued the issue of interpreter services in *Meštrovac* and

¹ In *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 176 P.3d 536 (2008); *Ferenčak v. Dep't of Labor & Indus. and Bd. of Indus. Ins. Appeals*, 142 Wn. App. 713, 175 P.3d 1109 (2008); *Rešulović v. Dep't of Labor & Indus.*, 2008 WL 1778229 (Apr. 21, 2008); and *Mašič v. Dep't of Labor & Indus.*, 2008 WL 1778315 (Apr. 21, 2008), claimants all sought relief against the Board. The Board requested intervention in the first three cases at the superior court level. Intervention was rejected in *Meštrovac* and *Rešulović* and was granted in *Ferenčak*.

² None of the claimants in *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008), sought specific relief against the Board; therefore, the Board did not attempt to intervene.

Ferenčak and asks this Court to affirm the decisions of the Court of Appeals.

The Board's concern in this case is limited to those claimants who have sought a monetary remedy against the Board by claiming they utilized a second, private interpreter during that hearing, in addition to the interpreter provided by the Board. Thus, the Board is concerned only with the issue of whether the Board is required to reimburse the cost of a private interpreter used by a claimant during a Board hearing to supplement the interpreter supplied by the Board.

II. STATEMENT OF THE CASE

Each Petitioner received some level of interpreter services, at Board expense, during the hearings before the Board. The level of interpreter services provided varied at the discretion of the Industrial Appeals Judge (IAJ) hearing the particular case. Each IAJ relied on the Board's rule, WAC 263-12-097,³ to determine whether and to what extent to provide interpreter services.

³ WAC 263-12-097 states:
Interpreters.

(1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the board of industrial insurance appeals, the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceeding. Appointment, qualifications, waiver, compensation, visual recording, and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW and General Rule provisions GR 11, GR 11.1, and GR 11.2.

In some cases, the IAJ permitted interpreters to interpret throughout the recorded proceeding but prohibited interpretation of private attorney-client communications between a claimant and claimant's counsel.⁴ In at least one case, *Kustura*, the IAJ limited the use of the interpreter to the claimant's testimony only. *Kustura*, 142 Wn. App. at 664.

The Board first became aware that some litigants were making claims for reimbursement of the cost of private interpreter services towards the end of the superior court proceeding in *Meštrovac*. A

(2) The provisions of General Rule 11.3 regarding telephonic interpretation shall not apply to the board's use of interpreters.

(3) The industrial appeals judge shall make a preliminary determination that an interpreter is able to accurately interpret all communication to and from the impaired or non-English-speaking person and that the interpreter is impartial. The interpreter's ability to accurately interpret all communications shall be based upon either (a) certification by the office of the administrator of the courts, or (b) the interpreter's education, certifications, experience, and the interpreter's understanding of the basic vocabulary and procedure involved in the proceeding. The parties or their representatives may question the interpreter as to his or her qualifications or impartiality.

(4) The board of industrial insurance appeals will pay interpreter fees and expenses when the industrial appeals judge has determined the need for interpretive services as set forth in subsection (1). When a party or person for which interpretive services were requested fails to appear at the proceeding, the requesting party or the party's representative may be required to bear the expense of providing the interpreter.

⁴ Particularly, in *Meštrovac*, the IAJ prohibited private attorney-client communication because he believed it compromised the objectivity of the interpreter. Specifically, the IAJ stated:

The interpreters are bound to rules of ethical conduct that prevent them from being interested in the outcome in any way, and I believe that by letting him assist you in communicating with your client, there is a very good chance that we might be asking the interpreter to violate the code of conduct by which he is [b]ound [sic].

Meštrovac, Clerk's Papers (CP) 464.

description of that case provides a background for the issue presented to this Court.

The superior court in *Meštrovac* broadly concluded that Mr. Meštrovac should be reimbursed for costs of private interpreters used while applying to the Department of Labor & Industries (Department) for benefits and later, to supplement the interpreter provided during his Board hearing. After that initial ruling, the Department requested clarification whether the Court meant that the Board or the Department was responsible for the expenses allegedly incurred during the hearing. CP 555. The superior court clarified and entered a judgment against the Board requiring the Board to reimburse Mr. Meštrovac for any interpreter services expenses incurred by him from the notice of appeal to the Board forward. The judgment ordered the Board to hold a hearing on remand to determine the amount of private interpreter services allegedly incurred by Mr. Meštrovac.⁵ Upon learning of the court's order, the Board requested intervention, which the superior court denied.

The Board (as well as the Department) appealed *Meštrovac*, and the Court of Appeals reversed. It concluded first that even if the IAJ should have allowed the interpreter to address attorney-client

⁵ As noted above, the Board had provided an interpreter for Mr. Meštrovac. The IAJ, however, had not allowed the interpreter to interpret off-the-record communications between claimant and claimant's counsel, concluding those were not part of the hearing. CP 463-64.

communications, *Meštrovac* showed no prejudice from that IAJ ruling warranting a remand, and that there was no legal basis for reimbursement of private interpreter costs. *Meštrovac*, 142 Wn. App. at 709, n.21. Second, the court concluded that the superior court should have allowed the Board to intervene. *Meštrovac*, 142 Wn. App. at 709.

After the adverse superior court decision in *Meštrovac*, the Board sought intervention in subsequent cases where a claimant requested monetary relief against the Board. In *Rešulović*, the court denied intervention but did not enter any order against the Board. In *Ferenčak*, the court granted intervention and did not enter any order against the Board.⁶

III. ARGUMENT

In each opinion addressing interpreter services provided by the Board, the Court of Appeals properly concluded that the claimant showed no legal right to reimbursement for additional interpreter services allegedly obtained. *Meštrovac*, 142 Wn. App. at 698-99; *Ferenčak*, 142 Wn. App. at 728. The Courts of Appeals also concluded in each case that the claimants failed to show any prejudice from restrictions on the use of interpreters during the hearings. *Meštrovac*, 142 Wn. App. at 698-99; *Ferenčak*, 142 Wn. App. at 728-29. As a quasi-adjudicative body, the

⁶ The Board did not attempt to intervene in *Kustura* because it preceded *Meštrovac*, and because neither the Department nor the claimants sought specific monetary relief against the Board in *Kustura*.

Board does not take a position on whether a ruling of an IAJ was prejudicial to a party's claim. The Board, however, discusses how a party may show prejudice because that remedy further illustrates why there is no statutory right to reimbursement of private interpreters.

For the reasons that follow, the Court of Appeals should be affirmed; there is no basis for reimbursement.

A. RCW 2.43 Does Not Require the Board to Pay for Interpreter Services Privately Incurred During a Board Hearing

Petitioners argue that because the Court of Appeals held that the IAJ should have allowed the Board's interpreter to interpret private attorney-client communication during the hearing, any private cost they may have incurred associated with that communication should be reimbursed by the Board. However, no statute requires or authorizes the Board to pay for the cost of privately retained interpreters. Moreover, to the extent the Board's own administrative rule voluntarily incurs the cost of an interpreter, WAC 263-12-097, the Board complied with its rule by paying for the interpreter services it provided. As shown below, but for the Board's rule, the Board would not have been required to pay any amount of the interpreter services provided to Petitioners. Therefore, because Petitioners had *no initial right* under the statute to have the Board pay for interpreter services, the request for reimbursement is without merit.

The plain language of RCW 2.43 confirms that the Board is not required to pay for interpreter services in a hearing initiated by one of the claimants. Under RCW 2.43.040, the cost of providing interpreter services is dependent on whether the governmental body *initiates* the legal proceeding. Specifically, RCW 2.43.040(2) provides:

In all legal proceedings in which the non-English-speaking person is a party, . . . or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings *initiated by agencies of government, the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.*

(Emphasis added.)

The Board does not initiate the legal proceeding. As noted in *Kustura*, the "Board's authority may be invoked only by the *claimant's* act of initiating an appeal of the Department's action." *Kustura*, 142 Wn. App. at 680. Because in each instance it was the claimant who filed an appeal of a Department order to the Board, it cannot be said that the Board was initiating any proceeding and, therefore, the Board is not responsible under the statute for interpreter services expenses. None of the claimants denies that RCW 2.43.040(2) and (3) distinguish between legal proceedings initiated by the government and proceedings initiated by some other party. RCW 2.43.040(3) unambiguously contemplates that there are legal proceedings in which a non-English-speaking person is

required to pay for his interpreter services absent a showing of indigency. There was no claim for or finding of indigency in these cases. Therefore, none of the claimants can be entitled to paid interpreter services on this ground. RCW 2.43.040(3).⁷

Thus, because RCW 2.43 does not provide any right to free interpreter services to the claimants in the first instance, the statute cannot provide a right of reimbursement. Moreover, the overall structure of RCW 2.43 precludes any conclusion that an erroneous discretionary ruling by a judge applying the statute should be remedied by reimbursement for a privately retained interpreter. This conclusion is necessary because RCW 2.43 applies equally to use of interpreters in the superior courts and when a Board or agency holds a hearing. There is no precedent for a statute that requires the trial court to reimburse a litigant if there has been an error in how interpreter services were provided.

As the Court of Appeals recognized, the primary remedy for such an error is to ask whether the error is prejudicial and, if so, to remand for further proceedings that correct the error. *See, e.g., Kustura*, 142 Wn. App. at 681-82. This Court should therefore conclude that RCW 2.43

⁷ In contrast to the Board, there are other boards that initiate proceedings to which this statute would apply. For example, under RCW 18.130, the Uniform Disciplinary Act, a “disciplining authority,” which is defined as an “agency, board, or commission,” has the authority to investigate violations of the Act; such boards “initiate” the proceeding under this act. *See* RCW 18.130.020(6) and RCW 18.130.090(1). The Board of Industrial Insurance Appeals, in contrast, has a narrower function hearing appeals by claimants or employers or other aggrieved persons of decisions made by the Department of Labor and Industries.

does not create any right for interpreter services for the claimant here and it creates no authority making a quasi-adjudicative agency liable for reimbursement of privately obtained interpreter services.⁸

B. Reimbursement for Private Interpreter Costs Is Inconsistent With the Statutory Purpose of RCW 2.43, to Ensure That Courts and Boards Use Qualified Interpreters

Reimbursement to a claimant who may have obtained private interpreter services does not satisfy the meaning or intent of RCW 2.43. This is why these statutes do not provide for reimbursement.

RCW 2.43.010 explains the legislative intent of providing interpreters for legal proceedings as something that is necessary to protect non-English-speaking individuals who “cannot be fully protected in legal proceedings unless *qualified* interpreters are available to assist them.” RCW 2.43.010 (emphasis added). Qualified interpreter is defined as “a person who is able readily to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English.” RCW 2.43.020(2). The statute sets forth standards and

⁸ Depending on the nature of the tribunal, there may be additional remedies for litigants aggrieved by a decision regarding use of an interpreter. A litigant in superior court may seek interlocutory review of a ruling regarding the use of an interpreter under RAP 2.3(b). Some state agencies and local agencies will be subject to judicial review for other agency action, RCW 34.05.570(4), or a writ of mandamus, to the extent those remedies are applicable.

procedures for determining “qualified,” as well as “certified,” interpreters. RCW 2.43.030.

When RCW 2.43 is read as a whole, it is a statute that governs procedures in courts and adjudicative agency hearings similar to the other procedural statutes in RCW Title 2. RCW 2.43 is not directed to addressing the costs of an interpreter who might be formally retained or informally consulted by a litigant. Neither the text of RCW 2.43 nor any implication of the statute requires reimbursement to litigants for interpreters not appointed by the court or adjudicative body.

By analogy, RCW 2.32.180 provides for use of qualified superior court reporters. If a party claims error in the court’s appointment or use of a court reporter, the statute does not provide for reimbursement to the party for hiring a private court reporter to shadow a judicial proceeding.

C. The Board Should Be Allowed to Intervene as a Party When Claimants Seek Monetary Relief Against the Board

The Court of Appeals in *Meštrovac* correctly concluded that the Board had authority to intervene and respond to claimant’s request for specific monetary relief against the Board.

In *Kaiser*, this Court addressed the need for quasi-judicial agencies to remain impartial in proceedings before them. In support of this position, this Court held that “the Board’s authority . . . begins with the principle that ‘[a]dministrative agencies are creatures of the legislature

without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication.” *Kaiser*, 121 Wn.2d at 780 (quoting *Washington State Human Rights Comm’n v. Cheney School Dist. No. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982)). In *Kaiser*, this Court ultimately concluded that the Board did not have the authority to “bring an appeal of a superior court judgment reversing the Board’s decision fixing interest.” *Id.*

Adhering to the principles in *Kaiser*, the Board became involved in these cases only to the extent that specific monetary relief was requested against the Board as though the Board itself were an actual party.⁹ The superior court in *Mestrovac* had issued an order that potentially compromised the impartial nature of Board proceedings by ordering the Board to hold a hearing to determine how much the Board owed to the claimant. The Board was thus faced with a superior court ruling that would significantly alter its procedures and statutory role as a neutral adjudicative body.

⁹ RCW 51.52.110 requires service of a notice of appeal to superior court on the Board for the sole purpose of having the Board certify the Board record to superior court. The Board, however, is not named as a party in an appeal to superior court. Specifically, that statute states:

Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof . . . on the board. . . . The board shall serve upon the appealing party, the director, . . . and file with the clerk of the court before trial, a certified copy of the board’s official record

Furthermore, this Court's ruling in *Kaiser* that the Board should not be a party to appeals of its decisions confirms indirectly that the superior court should not be entering a judgment against the Board. *Kaiser* was clear that the Board should have no direct interest in the outcome of appeals of its decisions and should not participate in such appeals. To allow claimants to make monetary claims against the Board in appeals of Board decisions to superior court places the Board in the position of becoming a party when *Kaiser* dictates that it should remain impartial and uninvolved. For this additional reason, the Court of Appeals properly concluded that there was no right of reimbursement from the Board.

The Court should conclude that under these facts, the Board properly sought intervention for limited purposes and the Court of Appeals correctly reversed the superior court's order denying intervention. *Mestrovac*, 142 Wn. App. at 543-44. The Board was not seeking to defend its rulings on the merits in these cases, but only to protect itself from judgments being entered against it, and to address orders that could affect its procedural integrity.

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IV. CONCLUSION

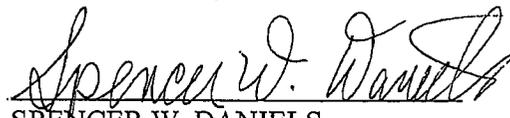
For the reasons set forth above, the Board respectfully requests that this Court affirm the decisions of the Court of Appeals in two regards. First, there is no right of reimbursement for privately retained interpreters used during a Board hearing. Second, the Board is a proper party intervener under these facts.

RESPECTFULLY SUBMITTED this 6 day of April, 2009.

ROBERT M. MCKENNA
Attorney General



JOHNNA S. CRAIG
WSBA No. 35559
Assistant Attorney General



SPENCER W. DANIELS
WSBA No. 6831
Assistant Attorney General

Attorneys for Respondent
Board of Industrial Insurance Appeals